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No.

IN THE

Supreme Court of the United States

October Term, 1984

MARY JANE STUBBS, as Administratrix
of the Estate of Dawn Maxine Stubbs,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The judicially-created Feres doctrine immunizing intramilitary torts should not be applied to the intentional tort of sexual harassment as a result of unlawful orders between male superior officers and female service members which led to the service member's suicide.

[(A) The mechanical application of the Feres doctrine below in a "but for" test is inappropriate both under the history and policy which gave rise to the Feres doctrine.

(B) The holding of the Eighth Circuit in this case and the Eighth Circuit's narrow "but for" reading of the "incident to service" prong of the Feres doctrine conflicts with the decisions of the Ninth Circuit requiring a flexible and rational analysis of the "incident to service" prong of the Feres doctrine.]

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 744 F.2d 58, and a copy appears in Appendix A to this petition beginning at 1a. The opinion of the United States District Court for the Eastern District of Arkansas is reported at 593 F.Supp. 521, and a copy appears in Appendix B to this petition beginning at 10a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered September 19, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §§ 1346(b), 2671, 2674, and 2680 are involved in this petition. They are reprinted in Appendix C to this petition beginning at page 32a.

STATEMENT OF THE CASE

This case involves an action brought under the Federal Tort Claims Act; 28 U.S.C. § 2671 et seq.; for wrongful death by sexual harassment and emotional distress. The plaintiff-petitioner is the sister of the decedent and the administratrix of her estate.

The decedent was a member of the United States Army stationed at Ft. Leonard Wood, Missouri for basic training. On December 21, 1982, she was allegedly the victim of "on the job" sexual harassment from her superior officer, Sgt. Soondar Sookdeo. As a result of this, and

because she was a rape victim in 1979, provable through statements made to her sister and others and in suicide notes, she shot herself to death on January 3, 1983 in Yell County, Arkansas.

The facts are succinctly stated by the district court (Appendix B, at 12a-14a; 593 F. Supp. at 522):

> Plaintiff's version of the facts, accepted as true for purposes of deciding defendants' motion, follow. Decedent, Dawn Stubbs, was a private in the U.S. Army stationed at Fort Leonard Wood, Missouri. On December 21, 1982, Drill Sgt. Sookdeo ordered her to the latrine for what she thought was some last minute cleaning before she left for the holiday. In the latrine, Drill Sgt. Sookdeo accosted decedent and said that if she would have sex with him, he would make the rest of her six-week stay there easier but if she refused it would be rougher on her. He also touched her breasts and genital area against her will. Decedent refused his advances.
>
> The next morning Dawn Stubbs left the base to spend the holidays with her sister, Mary Jane Stubbs in Yell County, Arkansas. Dawn had been raped in 1979 and this incident coupled with the potential of another forced sexual encounter caused her tremendous anxiety. Throughout the holidays she

talked repeatedly to her sister about the incident stating that she was extremely upset. Explaining that she felt trapped, she told her sister that if she complained, the Army would turn on her as a troublemaker.

Dawn was supposed to drive back to Fort Leonard Wood on January 3, 1983. About 5:00 p.m. that day, Mary Jane Stubbs saw that her sister was in the car clutching a shotgun. When she asked her what she was doing, Dawn replied that she was not going back to the Army and subject herself to the sexual harassment. Mary Jane tried to dissuade her sister, but to no avail. Dawn Stubbs killed herself with a shotgun blast to the head on the morning she was to return to Fort Wood.

While noting that the result was unfair, the district court concluded that the tort of sexual harassment in this context was barred by the Feres doctrine, Feres v. United States, 340 U.S. 135, 146 (1950), because the tort was "incident to service" and necessarily would involve an inquiry into the officer-enlisted member relationship, and, therefore, question military discipline in a civil court. (Appendix B, at 15a-22a; 593

F.Supp. at 523-24) The district court rejected petitioner's invitation to follow the Ninth Circuit's analysis in Johnson v. United States, 704 F.2d 1431 (9th Cir.1983), and held it was bound to the Eighth Circuit's more restrictive view. (Appendix B, at 15a-16a; 593 F.Supp. at 523) Accordingly, the district court granted the government's motion to dismiss.[1]

Petitioner appealed the dismissal to the United States Court of Appeals for the Eighth Circuit. A panel of the Eighth Circuit affirmed the district court per curiam in a published

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1. Petitioner also sued Sgt. Sookdeo under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The district court held that it lacked personal jurisdiction over him. Petitioner did not appeal that holding to the Eighth Circuit. After the district court ruled, the Eighth Circuit held in Brown v. United States, 739 F.2d 362 (8th Cir.1984), that Feres also bars suits against superior officers but not other enlisted personnel.

opinion which substantially relied on the "district court's well-reasoned opinion." (Appendix A; 744 F.2d 58)

REASONS FOR GRANTING THE WRIT

THE JUDICIALLY-CREATED FERES DOCTRINE IMMUNIZING INTRAMILITARY TORTS SHOULD NOT BE APPLIED TO THE INTENTIONAL TORT OF SEXUAL HARRASSMENT AS A RESULT OF UNLAWFUL ORDERS BETWEEN MALE SUPERIOR OFFICERS AND FEMALE SERVICE MEMBERS WHICH LED TO THE SERVICE MEMBER'S SUICIDE.

Introduction

1. This is a case which began with an illegal order which transcended the military and became personal but in the name of the military employer. The lower courts both held the factual basis for the claim "incident to service" and barred by the Feres doctrine.

Petitioner submits to the Court that there are two justifications for review of this issue: (A) the mechanical application of the Feres doctrine below in a "but for" test is inappropriate both under the history and policy which gave rise to the Feres doctrine; and (B) the holding of the Eighth Circuit in this case and the Eighth Circuit's narrow "but for" reading of the "incident to service" prong of the Feres doctrine conflicts with the decisions of the Ninth Circuit requiring a flexible and rational analysis of the "incident to service" prong of the Feres doctrine.

2. When the Federal Tort Claims Act (FTCA); 28 U.S.C. § 2671 et seq.; was adopted, sexual harassment was not recognized as a tort. The FTCA also did not recognize intramilitary tort immunity. Both came to pass by judicial decision. Sexual harassment is now

recognized as an independent tort[2] and as a ground for relief under Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000-e.[3]

Military service members are not precluded by their status from suing under the FTCA. Brooks v. United States, 337 U.S. 49, 51-52 (1949) (soldiers could sue where injury arose from activity not strictly incident to service). In 1950, however, this Court held in Feres v. United States, 340 U.S. 135 (1950), that the government was immune from intra-military torts under the FTCA, even though not mentioned as an exclusion in the FTCA, because of the uni-

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2. Schlei & Grossman, Employment Discrimination Law 421-29 (2d ed.1983); Pepper & Kennedy, Sex Discrimination in Employment 39-40 (1981).

3. See also Davis v. Passman, 442 U.S. 228 (1979) (sex discrimination states a Bivens claim).

quely federal character of military life and because civilian courts should not undertake judicial review of negligent military orders. Feres involved three cases: a death from a fire in an unsafe barracks and two military medical malpractice cases (one prevailing, one not).

In United States v. Brown, 348 U.S. 110, 112 (1954), the Court again held that the Feres doctrine applied to negligent orders and, in effect, adding the additional factor of "the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."

3. The Feres doctrine is contrary to the express language of the FTCA. Congress could have exempted those torts from the coverage of the FTCA, but it did not. Congress has passed no law since Feres to rectify the situation, but

indications in the legal press show it has lately had hearings on modification of the Feres doctrine because of the number of private compensation bills presented to it which were barred from relief under the FTCA by Feres.

The Feres doctrine in the Eighth Circuit has gone far beyond the Court's fear expressed in Brown that maintenance of suits for negligent orders would interfere with the military. Here, we have an act which was precipitated by a grossly illegal order that decedent would have had an absolute right to refuse had she not been deceived as to the sergeant's real illicit purpose. In addition, it involves a gross abuse of the superior officer's position to commit an illegal act. Finally, the sergeant's conduct transcended official orders and moved into personal conduct with the offer of a later official benefit if de-

cedent delivered on the sexual favors demanded of her.

4. Finally, while this Court has recognized that it will not authorize suits against the government where there are "special factors counselling hesitation"; Chappell v. Wallace, 103 S.Ct. 2362, 2364 (1983); "[t]his Court has never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." Id. at 2367, citing Brown v. Cline, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

A. The Feres doctrine was not intended to and should not bar FTCA claims against illegal orders involving the intentional tort of sexual harassment.

1. The court of appeals erred in applying the Feres doctrine to the intentional tort of sexual harassment.

The purpose of the Feres doctrine was to insulate negligent orders from judicial review. This case involves an intentional tort which was a perversion of the very "military discipline" the court of appeals was trying to protect. This case involves a grossly unlawful order -- not a mere negligent order.

Extortion of sexual favors from female military service members is not remotely "incident to service." The Feres doctrine was intended to prevent second-guessing of military discipline and civil litigation of negligent orders. This case

involves neither.

2. Obviously, military orders must be followed. But, this is not a case of good orders vs. bad orders or wise orders vs. unwise orders. The order to the latrine was to extort sex and has no place in the U.S. Army or the military of any civilized nation. It is conduct expected of the Huns or the Goths or even the Salvadorian army, but not the U.S. Army.

On the face of the FTCA; 28 U.S.C. §§ 1346 (b), 2671, 2674, 2680, quoted in Appendix C; this is a proper claim and there is no statutory exemption. This exemption exists only in case law by the Feres doctrine. Also, permitting this claim will not interfere with the Feres doctrine. The Feres doctrine has its place, but this case is not one of them.

3. Accordingly, the court of appeals misapplied the Feres doctrine to the facts of this case

producing a gross injustice in its finding that the tort of sexual harassment was "incident to service."

B. The decision below from the Eighth Circuit in narrowly applying Feres in a "but for test" is contrary to a decision of the Ninth Circuit applying a realistic functional approach.

1. The Eighth Circuit, by its own admission in this and other cases, broadly construes the Feres doctrine in favor of the government. (Appendix A at 5a; 744 F.2d at 60; accord, Miller v. United States, 643 F.2d 481, 491 (8th Cir. 1981) (en banc)) In the decision below, the court of appeals found "a relevant relationship between Stubbs' activity at the time of the incident and her military service," but not that her status involved a benefit derived from her

military status. (Appendix A at 7a & n.3; 744 F.2d at 60 & n.3)[4] That was enough to bar the claim.[5]

The Ninth Circuit, on the other hand, endorses a narrow Feres analysis which is based on the realities of military life and military expectations rather than on what "could have

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4. The district court found (and this was adopted by the court of appeals) that the fact decedent "could have been subject to military discipline at the time of the tortious action" was enough to bar the action. Appendix B at 15a (emphasis added); 593 F.Supp. at 523, citing Laswell v. Brown, 683 F.?d 261 (8th Cir.1982); Miller v. United States, 643 F.2d 481, 490 (8th Cir.1981) (en banc); Donham v. United States, 536 F.2d 765 (8th Cir.1976), aff'd sub nom, Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977); Chambers v. United States, 357 F.2d 224 (8th Cir.1966).

5. Miller went even farther denying a claim to a soldier working off duty who was killed in a construction accident working for a private contractor building base housing.

been." Johnson v. United States, 704 F.2d 1431 (9th Cir.1983).

2. The Ninth Circuit in Johnson considered four standards in a flexible, realistic approach: (a) the place where the tort occurred, (b) the duty status of the service member when the tort occurred, (c) the benefits accruing the service member from the activity which led to the tort, and (d) the nature of the service member's activities at the time of the tort; i.e., how will military discipline be affected if a cause of action is permitted. The Johnson court broke this last standard into three points.

First, was the service member subject to the compulsion of military orders or performing a military mission at the time of the tort? Here, the answer is no. The military mission was a pretext and ended and a personal mission of the sergeant, using the coercion of official position,

followed.

Second, was the service member directly or only remotely subject to military discipline? Here, she was not subject to military discipline because the sergeant would not dare court-martial her for refusal to follow his illegal illicit orders because he would expose himself to court-martial if she complained and was believed.

Third, does this case "involve the sort of close military judgment call that the Feres doctrine was designed to insulate from judicial review." Id. at 1439. While the military discipline rationale has force; see Chappell v. Wallace, supra, at 2364-65; it is far from absolute. In Chappell the Court added that it has never held that service members are barred from the courts for constitutional wrongs committed against them. Id. at 2367, quoted ante, page 15.

The Eighth Circuit below applied a mechani-

cal "but for" test that decedent "could have been" subject to military discipline, not a realistic functional test as in the Ninth Circuit.[6] Petitioner argued in both courts below that Johnson should be applied, but that argument was rejected. If this case arose in the Ninth Circuit, the result would likely have been just the opposite, and the government would have been the petitioner.

3. This Court should grant the writ and clarify whether the rigid "but for" test of the Eighth Circuit or a "functional analysis" which considers the nature of the tort of the Ninth

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6. This case is not, by any means, factually identical to Johnson. By way of comparison, the Eighth Circuit's Miller decision is substantially similar to Johnson reaching the opposite result on the application of the Feres doctrine. These two cases starkly show the conflict in the circuits.

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Circuit should be followed by the federal courts in applying the Feres doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted because of misapplication of the policy of the Feres doctrine or because of a conflict in the circuits in how the Feres doctrine is applied.

Respectfully submitted,

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December 17, 1984

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Appendix A

Mary Jane STUBBS, as Administratrix of the Estate of Dawn Maxine Stubbs, Appellant,

v.

UNITED STATES of America and Drill Sgt. Sookdeo, Appellees.

No. 84-1446.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 11, 1984.

Decided Sept. 19, 1984.

[744 F.2d 58]

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

PER CURIAM.

The administratrix of the estate of Dawn Maxine Stubbs brought suit against the

defendants under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. The complaint also alleges causes of action based on state tort law and on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Appellant sought damages from the defendants, the United States and a drill sergeant in the United States Army, alleging wrongful death by sexual harassment and emotional distress. The sole issue on appeal is the propriety of the district court's[1] dismissal of the action pursuant to Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). We affirm.

The facts were succinctly stated by the district court:

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1. The Honorable G. Thomas Eisele, Chief Judge, United States District Court, Eastern District of Arkansas.

Plaintiff's version of the facts, accepted as true for purposes of deciding defendants' motion, follow. Decedent, Dawn Stubbs, was a private in the U.S. Army stationed at Fort Leonard Wood, Missouri. On December 21, 1982, Drill Sgt. Sookdeo ordered her to the latrine for what she thought was some last minute cleaning before she left for the holiday. In the latrine, Drill Sgt. Sookdeo accosted decedent and said that if she would have sex with him, he would make the rest of her six-week stay there easier but if she refused it would be rougher on her. He also touched her breasts and genital area against her will. Decedent refused his advances.

The next morning Dawn Stubbs left the base to spend the holidays with her sister, Mary Jane Stubbs in Yell County, Arkansas. Dawn had been raped in 1979 and this incident coupled with the potential of another forced sexual encounter caused her tremendous anxiety. Throughout the holidays she talked repeatedly to her sister about the incident stating that she was extremely upset. Explaining that she felt trapped, she told her sister that if she complained, the Army would turn on her as a troublemaker.

Dawn was supposed to drive back to Fort Leonard Wood on January 3, 1983. About 5:00 [a.m.] that day, Mary Jane Stubbs saw that her sister was in the car clutching a shotgun. When she asked her what she was doing, Dawn replied that she was not going back to the Army and subject

herself to the sexual harassment. Mary Jane tried to dissuade her sister, but to no avail. Dawn Stubbs killed herself with a shotgun blast to the head on the morning she was to return to Fort Wood.

After considering relevant caselaw, the district court dismissed the action against the United States concluding that since the alleged tortious conduct was "incident to service," the suit was barred by the Feres doctrine.[2] Appellant contends that this was error.

In a recent decision we stated:

> In a series of decisions now known as the Feres doctrine, the Supreme Court established a judicially created exception to the waiver of sovereign immunity in the FTCA, holding that the United States is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service.

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2. As indicated, the estate also sued Sergeant Sookdeo under the FTCA and Bivens. The district court dismissed the Bivens action for lack of in personam jurisdiction over Sookdeo. Since appellant has not appealed from that ruling, we express no opinion as to whether Feres would also bar the Bivens cause of action if brought in the proper forum.

Brown v. United States, 739 F.2d 362 at 364 (8th Cir.1984).

We have examined the Feres decision and its doctrinal underpinnings in several prior opinions. See, e.g., Laswell v. Brown, 683 F.2d 261 (8th Cir.1982), cert. denied, 459 U.S. 1210, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983); Miller v. United States, 643 F.2d 481 (8th Cir.1981) (en banc); Chambers v. United States, 357 F.2d 224 (8th Cir.1966). An extended discussion of the Feres doctrine, its various asserted rationales, and the wealth of decisions interpreting the doctrine will not be repeated here. Suffice it to say that, despite criticism, the doctrine retains its vitality, see Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), and has been given a "broad construction" by this circuit. Miller, 643 F.2d at 491.

In Brown, we refined the analytical frame-

work to be used in determining whether or not Feres should bar a claim:

> We believe that our analysis can be broken down into two parts: (1) whether there is a relevant relationship between the service member's activity and the military service, and (2) whether military discipline will be impeded if the challenged conduct is litigated in a civil action.
>
> . . . To determine whether a relevant relationship exists between the service member's activity and the military service, we focus our attention on three factors that our court has considered important: the duty status of the service member, the location of the injury, and the nature of the activity.

Brown, supra, at 367.

The first two factors, the duty status of the service member at the time of the injury and the location of the injury, certainly weigh in favor of applying Feres. Both Stubbs and her sergeant were on duty at the time of the incident and the alleged sexual harassment occurred on the Fort Leonard Wood military post. The third factor to consider is the nature of the activity,

or, in other words, "whether the activity out of which the action arose served some military purpose or mission." Brown, supra, at 368. At the time, Private Stubbs was under orders from a superior to report for what she thought was latrine duty. It was here that Sergeant Sookdeo attempted to use the threat of military discipline to extort sexual favors from Stubbs. While the sexual harassment certainly served no military purpose, we believe that, on balance with the other two factors, a relevant relationship between Stubbs' activity at the time of the incident and her military service has been shown.[3]

---

3. At the time of the incident, Stubbs was not enjoying any benefit peculiar to her military status and thus this is not a case which fits in the "special category of cases in which the Feres rule has been applied because the service members, at the time of the injury, were enjoying a benefit because of their status as military personnel." Brown, supra, at 368.

Turning to the second prong of the analysis, we agree with the district court that military discipline would be impaired if Stubbs were allowed to maintain the suit against the United States. The trial would undoubtedly question the interaction between an officer and his subordinate. Moreover, at least part of Stubbs' cause of action is premised on allegations that military superiors were aware of sexual harassment of female enlisted personnel on the base, and yet did nothing to prevent it. It is also alleged that the military establishment would have resisted any claims of sexual harassment leveled at its noncommissioned officers and would have labeled Stubbs a troublemaker had she complained about the incident. The claim thus appears to be that the United States created the atmosphere which ultimately led to Stubbs' suicide. This claim would directly question the disciplinary decisions

of superior officers in failing to prevent the incident and in creating a situation where enlisted personnel are discouraged from making complaints. All of these inquiries go to the heart of military decisionmaking and discipline, and thus are barred by Feres. Further discussion of the reasoning supporting our conclusion can be found in the district court's well-reasoned opinion.

Therefore, based on our analysis and on the reasoning and conclusions of the district court, which do not appear to be erroneous, we affirm. See 8th Cir.R. 14.

Appendix B

Mary Jane STUBBS, as Administratrix of the Estate of Dawn Maxine Stubbs, Plaintiff,

v.

UNITED STATES of America and Drill Sgt. Sookdeo, Defendants.

United States District Court, E.D. Arkansas, W.D.

March 13, 1984.

[593 F.Supp. 521]

MEMORANDUM AND ORDER

EISELE, Chief Judge.

Pending before the Court is defendants United States of America's and Sgt. Sookdeo's motion to dismiss or, in the alternative, for summary judgment. The Court will grant the defendants' motion and dismiss the case.

Rule 12(b) of the Federal Rules of Civil Procedure states, "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ." In considering the 12(b)6 issue, whether plaintiff stated a claim against the U.S.A. upon which relief can be granted, both parties' arguments were based entirely on the plaintiff's version of the facts; the Court did not need to look beyond the pleadings to decide the issue. Accordingly, even though both parties submitted material outside the pleadings and general order 13 statements, these submissions were excluded by the Court and do not have the effect of

converting the motion to dismiss into a motion for summary judgment.

Plaintiff, the sister and administratrix of the estate of Dawn Stubbs, an enlisted woman who took her own life, seeks two million dollars in monetary damages from the defendants, the United States and Sergeant Sookdeo, the noncommissioned officer who was Dawn's drill sergeant, alleging wrongful death by sexual harassment and emotional distress.

Plaintiff's version of the facts, accepted as true for purposes of deciding defendants' motion, follow. Decedent, Dawn Stubbs, was a private in the U.S. Army stationed at Fort Leonard Wood, Missouri. On December 21, 1982, Drill Sgt. Sookdeo ordered her to the latrine for what she thought was some last minute cleaning before she left for the holiday. In the latrine, Drill Sgt. Sookdeo accosted decedent and said

that if she would have sex with him, he would make the rest of her six-week stay there easier but if she refused it would be rougher on her. He also touched her breasts and genital area against her will. Decedent refused his advances.

The next morning Dawn Stubbs left the base to spend the holidays with her sister, Mary Jane Stubbs in Yell County, Arkansas. Dawn had been raped in 1979 and this incident coupled with the potential of another forced sexual encounter caused her tremendous anxiety. Throughout the holidays she talked repeatedly to her sister about the incident stating that she was extremely upset. Explaining that she felt trapped, she told her sister that if she complained, the Army would turn on her as a troublemaker.

Dawn was supposed to drive back to Fort Leonard Wood on January 3, 1983. About 5:00 p.m. that day, Mary Jane Stubbs saw that her sister was in the car clutching a shotgun. When she asked her what she was doing, Dawn replied that she was not going back to the Army and subject herself to the sexual harassment. Mary Jane tried to dissuade her sister, but to no avail. Dawn Stubbs killed herself with a shotgun blast to the head on the morning she was to return to Fort Wood.

I. Stubbs v. U.S.A.

Plaintiff is proceeding against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., and the pendent state claim.

The only waiver of sovereign immunity that will support the exercise of subject matter

jurisdiction over plaintiff's claim against the United States is the Federal Tort Claims Act (FTCA). Therefore, the decisive issue before the Court is whether the Feres doctrine bars plaintiff's cause of action under the FTCA. In Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court held without dissent that "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146, 71 S.Ct. at 159.

Plaintiff argues strenuously that the sexual advance by Sgt. Sookdeo that allegedly caused Stubbs' death cannot be categorized as "incident to service" and should not be barred by the Feres doctrine. To support the premise that Stubbs' death was not "incident to service" plaintiff relies on Johnson v. United States, 704

F.2d 1431 (9th Cir.1983). In Johnson, the Ninth Circuit Court of Appeals summarized the standard it uses to determine whether an activity is "incident to service" by stating, "[W]here there is no relevant relationship between the service member's behavior and the military interests that might be jeopardized by civil suits, the Feres doctrine cannot bar recovery." Id. at 1440.

Using the Johnson test, the plaintiff argues that the military's only interest in a case such as this is whether military discipline will be affected if a cause of action is permitted. Plaintiff argues that there is no relevant relationship between the maintenance of military discipline and the sexual advance perpetrated upon Dawn Stubbs, except that discipline was the vehicle by which Sgt. Sookdeo hoped to bring about the extortion of sex from the decedent.

However unjust it may appear on the surface, it is this very fact that completely bars Stubbs' action under the settled law in the Eighth Circuit. To summarize the consistent conclusions of the Eighth Circuit of Appeals when deciding Feres doctrine issues, it can be said that "incident to service" is given a broad interpretation and that if the plaintiff was, or could have been, subject to military discipline at the time of the tortious action then the action is barred. Laswell v. Brown, 683 F.2d 261 (8th Cir.1982); Miller v. United States, 643 F.2d 481, 490 (8th Cir.1981) (en banc); Donham v. United States, 536 F.2d 765 (8th Cir.1976), aff'd sub nom, Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977); Chambers v. United States, 357 F.2d 224 (8th Cir.1966).

The Chambers and Miller cases are particularly illustrative. In Chambers, the plaintiff's decedent drowned while swimming in a pool located on a military base. Finding that plaintiff's decedent was not on furlough status, the Court stated, "The significant fact here is that Chambers was assigned to duty at the Whiteman base, subject to the control of his military supervisors." Id. at 229. Even though the airman in Chambers was not engaged in the performance of a military duty, he was subject to military control and this served as the basis of the court's finding that drowning in the base swimming pool was "incident to service."

The direct relationship between the possible impairment of military discipline and the finding that an activity is "incident to service" is firmly established in the Eighth Circuit's recent consideration of the Feres doctrine in Miller v. United

States, 643 F.2d 481 (8th Cir.1980) (en banc).

The facts of that case follow.

> The accident that caused Private Miller's death occurred on June 23, 1977. On that day and at all relevant times he was a member of the United States Army stationed at Fort Wainwright, Alaska. On June 23 Private Miller was present and accounted for. After normal duty hours, with the knowledge and permission of his superior officers, he was employed for part-time work by one George Rodman, a supervisor for Northside-Danzi Construction Co. The work was done on the post and consisted of putting up scaffolding poles for on-base residential housing. Miller was not on leave or on pass, and could have been called to perform military duties at any time. The work had been going on for some time after normal duty hours each day.
>
> Plaintiffs claim that Private Miller's death occurred when an aluminum ladder with which he was working came in contact with an uninsulated electric wire owned and controlled by the Department of the Army. They allege a number of particulars in which the United States (presumably acting through Miller's commanding officer) was negligent, including, for example, the failure to de-energize the electric line in question.

Id. at 490.

Initially, an Eighth Circuit panel, with one judge dissenting, found that Miller's death did not arise out of activities "incident to service":

> PFC Miller was off duty, working in a civilian capacity at a part-time job for a private contractor. He was not performing any military duties or complying with any orders, nor was he taking advantage of a military privilege. This work was not something that a serviceman would ordinarily do while off duty. Even though he was on active duty and on a military base, he was exactly in the same position as any civilian employee of the private contractor might have been at that time and place.
>
> PFC Miller had permission from his superior officers to work the part-time job. The Army "loaned" him out to a private contractor and, for all practical purposes, temporarily released their jurisdiction and control over him. At the time of the injury, the decedent was subject to the control and authority of his civilian employer--not his military superiors. The government takes a risk when it permits the members of the military to engage in outside activities totally unrelated to military life. If the government chooses to "loan" out the members of its military to civilian government employees, it must bear the risk of liability for resulting injuries. PFC Miller's death did not arise out of activities incident to service, and,

therefore, the facts of the case do not fall within the rationale of Feres.

Id. at 486-87.

The case was reheard en banc and the Eighth Circuit's brief history of allowing servicemen and women who might be subject to military discipline to bring an action under the FTCA was ended. Acknowledging that there is an element of unfairness in denying Private Miller's survivors the rights that the family of a civilian employee working side by side with him would unquestionably have had, the Court of Appeals concluded nevertheless that his claim was barred by the Feres doctrine. Id. at 495.

The Miller court explained the necessity for establishing the Feres doctrine, "The fact is that the Supreme Court, in its construction of the Federal Torts Claim Act, has decided that full recovery in tort by individual service people

must be subordinated to certain overriding policy considerations." Id. at 495. The overriding policy consideration receiving the full spectrum of judicial protection and non-intervention is military discipline. The Court reasoned that if they allowed Miller's suit against the military then "the conduct of Miller's military supervisor would be called in question in the civil courts, a circumstance that might well have [a] destructive effect on military authority and discipline . . . ." Id. at 494.

The court concluded that the circumstances leading to Miller's death arose out of life on a military post and were thus "incident to service." The action was barred.

As the Eighth Circuit found that a serviceman injured while under the control of a private employer presents the possibility of undermining military discipline, we can conclude that allowing

a suit against an officer to question the interaction between that officer and his subordinate would surely present the same possibility. In explaining the Feres doctrine, it has been said that it is the threat of being sued, the suit and not the recovery, that would undermine the established relationship between enlisted military personnel and their supervisors. See Mondelli v. United States, 711 F.2d 567, 568 (3rd Cir. 1983); Henninger v. United States, 473 F.2d 814, 815-16 (9th Cir.1973).

The Court concludes that allowing this suit in federal court would permit the civilian intervention in military relationships that the Feres doctrine was created to prevent. Accordingly, the Court finds that the alleged tortious conduct that precipitated Dawn Stubbs' death was "incident to service."

One could argue that finding "incident to service" does not resolve the issue because an important distinction can be made. The injuries in the cases discussed hereto were all the result of alleged military negligence, whereas the injury here was allegedly caused by the intentional acts of a military officer.

This was the argument raised in Laswell v. Brown, 683 F.2d 261 (8th Cir.1982). The plaintiffs alleged that the Army "killed" Laswell when they ordered him to attend and participate in three atomic test explosions. They assert that the Feres doctrine was intended to prevent liability for "common forms" of negligence, but should afford no protection to the Army in Laswell's situation due to the special and deliberate nature of the wrongful activity.

The Eighth Circuit Court of Appeals rejected this proposition. "The Feres doctrine does not

distinguish between claims based on the alleged level of culpability of the tortfeasor; whether a negligent, a reckless or even an intentional tort is alleged." (citations omitted) The purposes for which Feres was created and continues to exist are equally advanced regardless of whether a simple negligence case is presented or the allegations constitute a more willful act." Id. at 265. This Court can, therefore, not avoid concluding that plaintiff's action is barred by the Feres doctrine.

Having so decided, the court need not address the jurisdictional question, nor the pendent state claim. See United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941); United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). The defendants' motion to dismiss

for failure to state a claim is granted and the plaintiff's case against the U.S.A. is dismissed.

II. Stubbs v. Sgt. Sookdeo.

Sergeant Sookdeo is sued in both his official and individual capacities. Plaintiff is proceeding under the FTCA, the pendent state claim and a Bivens cause of action alleging that the sergeant's conduct constitutes sexual harassment which violates the due process clause of the Fifth Amendment to the U.S. Constitution.

The action against Sookdeo under the FTCA is barred by the same principle (lack of waiver of sovereign immunity) that bars plaintiff's suit against the United States. Hawaii v. Gordon, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed. 2d 191 (1963); Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963).

Defendants argue that this Court lacks in personam jurisdiction over Sgt. Sookdeo for purposes of the Bivens action. Plaintiff asserts that the Arkansas "long arm statute," Ark.Stat. Ann. § 27-2501(C)(1)(c) and (f) (Repl.1979) provides the basis for personal jurisdiction over Sgt. Sookdeo.

Plaintiff's jurisdictional argument is based on her interpretation of the facts. She asserts that it is quite likely that Sgt. Sookdeo was aware decedent was going to leave the base for the holidays and that it is not "unreasonable" to assume that Sgt. Sookdeo knew that decedent was travelling to Arkansas. Further, plaintiff asserts that it was foreseeable to Sgt. Sookdeo that his conduct would affect decedent's emotional state wherever she would be.

Based on this "foreseeability" argument and the fact that the ultimate harm occurred in Arkansas, plaintiff asserts that it would not violate due process to make Sgt. Sookdeo defend in Arkansas. To support this theory, plaintiff analogizes to the non-resident vehicle owner statute, Ark.Stat.Ann. § 27-342.2 (Repl.1979), which provides for personal jurisdiction over a vehicle owner even though he has never been in Arkansas and was unaware his vehicle was in Arkansas. Plaintiff argues that the United States Supreme Court has sustained the constitutionality of such nonresident vehicle statutes and that similar reasoning would sustain the assertion of jurisdiction over Sgt. Sookdeo.

The Court rejects these arguments and narrows the issue to whether the jurisdictional requirements of section 27-2502(C)(1)(c) have been met, or to paraphrase that section: Has

Sgt. Sookdeo caused tortious injury by an act or omission in Arkansas?

Defendant Sookdeo has submitted an affidavit stating that he has never been physically present in Arkansas. He further states that he has not transacted any business in Arkansas, contracted to supply services or things in Arkansas, contracted to insure anyone or anything located in Arkansas, or received any money or property from an estate in Arkansas. Defendant argues that any tortious conduct alleged to have occurred, was initiated and completed on December 21, 1982, in Missouri.

The Court finds that Sgt. Sookdeo has no contacts with Arkansas and to exercise jurisdiction over him would violate the clear mandate of the United States Supreme Court. Due process requires at least minimum contacts before personal jurisdiction may properly be exercised

over a nonresident defendant. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 310, 100 S.Ct. 559, 586, 62 L.Ed.2d 490 (1980); International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

The Court concludes that it lacks personal jurisdiction over plaintiff's "federal" claim. Given this conclusion, the Court cannot retain jurisdiction over the pendent state claim. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); Jennings v. Davis, 339 F.Supp. 919 (W.D. Mo. 1972), aff'd 476 F.2d 1271 (8th Cir.1973); Hughes v. Ford Motor Credit Co., 360 F.Supp. 15 (E.D. Ark.1973).

As the Court lacks personal jurisdiction over the defendant, Sgt. Sookdeo, it will dismiss the case without addressing the substantive issues this claim raises.

It is therefore Ordered that the defendants' motion to dismiss be, and it is hereby, granted.

Appendix C

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2674 provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .
>
> . . .

28 U.S.C. § 1346(b) provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction

of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2671 provides:

As used in this chapter and section 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily

acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a members of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. § 2680 provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs

duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel,

slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

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No. 84-1068 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARY JANE STUBBS, ADMINISTRATRIX OF THE ESTATE OF DAWN MAXINE STUBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, the administratrix of the estate of Dawn Maxine Stubbs, an Army private, brought this suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, contending that sexual harassment by an Army drill sergeant caused the suicide of Private Stubbs. Petitioner contends that the courts below erred in holding that her claim is barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which prohibits FTCA suits by servicemembers for alleged torts incident to military service.

1. a. Petitioner alleges that while Private Stubbs was stationed at Fort Leonard Wood, Missouri, Army Drill Sergeant Sookdeo ordered her to a latrine for what she believed to be cleaning duties. Sgt. Sookdeo then allegedly confronted Private Stubbs, demanded sex from her in exchange for an easier tour of duty, and improperly

touched her. These advances were rebuffed by Private Stubbs, who left Fort Wood the next morning on holiday leave. This incident, coupled with a prior rape suffered by Private Stubbs in 1979, allegedly caused Private Stubbs severe anxiety leading to her suicide on the day she was due to return to Fort Wood. Pet. App. 3a-4a.

Petitioner then brought this action in the United States District Court for the Eastern District of Arkansas.[1] She alleged that the government was liable not only for Sergeant Sookdeo's actions but because the Army knew of sexual harassment at Fort Wood and "did nothing to prevent it" (Pet. App. 8a). Petitioner also alleged that "the military establishment" at Fort Wood "would have resisted any claims of sexual harassment leveled at its noncommissioned officers and would have labeled Stubbs a troublemaker had she complained about the incident"; in this way, the complaint alleged, the Army created "the atmosphere which ultimately led to Stubbs' suicide" (*ibid.*).[2]

The district court, relying on *Feres*, dismissed the complaint (Pet. App. 10a-26a). It ruled that "allowing this suit in federal court would permit the civilian intervention in military relationships that the *Feres* doctrine was created to prevent" (*id.* at 23a).

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[1]In addition to suing the government under the FTCA, petitioner also sued Sergeant Sookdeo in his individual capacity. This claim was dismissed by the district court for lack of in personam jurisdiction. Pet. App. 26a-30a. Petitioner did not appeal this dismissal to the court of appeals. See Pet. 8 n.1.

[2]Specifically, petitioner's complaint alleged that "[t]he Army has knowledge of sexual harassment of female enlisted personnel, but it has taken no positive steps to prevent it or to enable them to make effective complaints" (Complaint para. 18) and that "[t]he military establishment protects its own, and an allegation of sexual harassment made by decedent would have been met with official resistance, been rebuffed, and resulted in her being labeled a 'troublemaker' throughout her tour of duty in the Army" (Complaint para. 19).

b. The court of appeals affirmed (Pet. App. 1a-9a; 744 F.2d 58). The court noted that "[w]hile the sexual harassment certainly served no military purpose" (Pet. App. 7a), both Private Stubbs and Sgt. Sookdeo were, at the time of the incident, on duty on a military post, and the alleged misconduct involved "the threat of military discipline to extort sexual favors from Stubbs" (*id.* at 6a-7a). For these reasons, the court concluded, the government had shown the necessary relationship between the incident and Stubbs's military service to bring petitioner's claim within the *Feres* doctrine (*id.* at 7a). The court of appeals noted that "[t]he trial [of petitioner's claim] would undoubtedly question the interaction between an officer and his subordinate" as well as "directly question the disciplinary decisions of superior officers in failing to prevent the incident and in creating a situation where enlisted personnel are discouraged from making complaints" (*id.* at 8a-9a). The court ruled that "[a]ll of these inquiries go to the heart of military decision-making and discipline, and thus are barred by *Feres*" (*id.* at 9a).

2. The decision of the court of appeals is plainly correct. As this Court has frequently noted, the principal basis of the *Feres* doctrine is the need to prevent judicial interference with the "peculiar and special relationship of the soldier to his superiors" and to avoid "the effects of the maintenance of [servicemembers' FTCA suits for injuries incident to military service] on discipline" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)). See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 299 (1983); *Stencel Aero Engineeering Corp.* v. *United States*, 431 U.S. 666, 671 (1977); *United States* v. *Muniz*, 374 U.S. 150, 162 (1963). The Court has further explained that such suits are barred because "[t]he trial would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."

Stencel Aero Engineering Corp., 431 U.S. at 673. As Justice Marshall has stated, "[t]he basis of *Feres* was the Court's concern with the disruption of '* * * [the] relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Id.* at 676 (dissenting opinion) (citation omitted).

Petitioner's claim directly implicates these concerns. Petitioner is asserting that the statements and actions of a military superior toward an enlisted servicemember, while both were on duty, improperly harassed the servicemember for illegitimate personal reasons. This is precisely the kind of claim that *Feres* was intended to bar; without prejudging the merit of petitioner's particular claim, it is entirely clear that if claims like petitioner's were allowed, any servicemember who believed that he was injured because his military superior issued an order for improper personal reasons, or otherwise verbally harassed him, could bring suit challenging the order. This is the very danger that *Feres* was designed to avert.[3]

In addition, petitioner has challenged the decisions of supervisory military officials at Fort Wood, asserting that they did not adequately seek to eliminate sexual harassment and that they created the impression that they would have retaliated against any servicemember who complained of sexual harassment. These claims, also, implicate policies at the core of *Feres*; they challenge "complex, subtle, and

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[3]Petitioner also appears to suggest (*e.g.*, Pet. 13-14, 17) that the *Feres* doctrine itself should be reconsidered. But this Court has twice recently reaffirmed *Feres* (*Chappell* v. *Wallace, supra*; *Stencel Aero Engineering Corp.* v. *United States, supra*), and Congress is aware of the 35-year old *Feres* doctrine and has deliberately chosen not to overrule it. See *Flood* v. *Kuhn*, 407 U.S. 258, 283-284 (1972). See generally H.R. Rep. 97-384, 97th Cong., 1st Sess. Pt. I, at 5 (1981); *The Feres Doctrine As It Relates To Private Claims: Hearings Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

professional decisions as to the composition, training, * * * and control of a military force" — decisions about which this Court has said: "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); see also *Chappell*, 462 U.S. at 301-302; *Rostker* v. *Goldberg*, 453 U.S. 57, 65-66 (1981).[4]

Petitioner's principal rejoinder (see Pet. 16-18) appears to be that *Feres* precludes only suits alleging negligence, not suits alleging intentional torts. But petitioner cites no decision supporting this contention; the courts of appeals have consistently held that the *Feres* doctrine bars servicemembers' suits alleging intentional torts incident to military

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[4]Petitioner sometimes appears to suggest (see, *e.g.*, Pet. 14, 20-21) that *Feres* does not bar her claim because sexual harassment plays no proper role in military life. But racial discrimination is no less repugnant to the proper operation of the military, and in *Chappell* v. *Wallace, supra*, the Court unanimously held that the principles of *Feres* precluded a damages action by servicemembers against their superior officers alleging racial discrimination. In general, a tort will seldom, if ever, play a legitimate role in military life; thus, if petitioner's reasoning were accepted, the *Feres* doctrine would be wholly abrogated. The question under *Feres* is whether a *claim* of wrongful conduct presents the dangers of judicial interference in military discipline that *Feres* is designed to prevent. It is clear that claims of sexual harassment present such dangers.

We of course agree with petitioner that sexual harassment is wholly inappropriate and inexcusable in the military. But the remedy for sexual harassment in the military lies not in an FTCA action against the government but in other remedial mechanisms that would have been available to Private Stubbs. She could have filed a complaint with an Army Equal Employment Opportunity staff office or with the Inspector General at Fort Wood; she could have initiated the "chain of command" remedy provided by Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938 (see *Chappell*, 462 U.S. at 302-303); she could have preferred criminal charges against Sgt. Sookdeo; and, in her particular unit, we are advised by the Army that she could have approached a female drill sergeant with her complaint. We are also advised that the Army conducted two separate investigations of the alleged incident that is the basis of this suit.

service. See *Stanley* v. *CIA*, 639 F.2d 1146, 1152 (5th Cir. 1981) (citing cases). See also *Chappell* v. *Wallace, supra.* This Court has previously declined to consider the contention that *Feres* does not bar suits alleging intentional torts (*Lewis* v. *United States*, cert. denied, 457 U.S. 1133 (1982)); as we explained in our memorandum in opposition in *Lewis*,[5] the policies underlying the *Feres* doctrine — the need to avoid the disruption of military discipline and the second-guessing of military decisions — apply even more strongly when a serviceman challenges an intentional act of his superior officers.[6]

Finally, petitioner asserts (Pet. 18-22) that the court of appeals' decision conflicts with *Johnson* v. *United States*, 704 F.2d 1431 (9th Cir. 1983). But petitioner herself acknowledges that "[t]his case is not, by any means, factually identical to *Johnson*" (Pet. 22 n.6). *Johnson* was an FTCA action by an enlisted man for injuries from an automobile accident caused by a fellow enlisted man who had become intoxicated while working with the plaintiff, while

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[5]We have sent a copy of this memorandum to counsel for petitioner.

[6]We note that while petitioner asserts (Pet. 11-12) that sexual harassment is a tort, she fails to cite any cases that so hold. In any event, even if sexual harassment is a tort, petitioner's claim would appear to be barred not only by *Feres* but by the intentional tort exception to the FTCA. 28 U.S.C. 2680(h). Similarly, petitioner's claim that military officials should have taken additional measures to combat sexual harassment is plainly barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).

Petitioner also asserts (Pet. 12) that sexual harassment is unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* But Title VII does not apply to the military. See, *e.g.*, *Gonzales* v. *Department of the Army*, 718 F.2d 926, 927-929 (9th Cir. 1983); *Johnson* v. *Alexander*, 572 F.2d 1219, 1224 (8th Cir.), cert. denied, 439 U.S. 986 (1978). The fact that Congress did not intend Title VII to apply to the military is further evidence that Congress would not have wanted claims of sexual harassment brought by servicemembers to be litigated in FTCA actions, either.

both were off duty, at a NCO Club at which liquor was served after hours in violation of military regulations and state law. The Ninth Circuit ruled that the *Feres* doctrine did not bar the plaintiff's claim that the government was negligent in permitting the NCO Club to remain open; it reasoned that the plaintiff, at the time of the negligence, "was not subject in any real way to the compulsion of military orders or performing any sort of military mission" and "was not under military control" (704 F.2d at 1439). The court concluded that "there is simply no connection between off-duty work as a bartender and the kind of military interests that the Supreme Court intended to protect in *Feres*" (704 F.2d at 1440). In this case, by contrast, Private Stubbs was on duty and, at the time of the alleged tort, directly subject to military control and discipline. Thus, petitioner, unlike the plaintiff in *Johnson*, challenges a sergeant's on-duty behavior toward a subordinate, as well as the military judgments of the sergeant's superiors in allegedly failing to prevent sexual harassment at Fort Wood. While we do not agree with the holding in *Johnson*, it is apparent that this case involves a claim that poses a far more obvious threat to military discipline.[7]

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[7]Not only is there no conflict between *Johnson* and the decision below, but petitioner is even incorrect in suggesting that the Ninth Circuit in *Johnson* applied a different test from that applied by the Eighth Circuit [illegible] the court in *Johnson*, the court below applied the *Feres* doctrine by reference to the place the tort occurred, the duty status of the plaintiff, the nature of the activity, and the impact on military discipline that the suit could cause. Compare *Johnson*, 704 F.2d at 1436-1440 with Pet. App. 6a-8a. Indeed, the court below cited its decision in *Brown* v. *United States*, 739 F.2d 362 (1984), petition for cert. pending, No. 84-636, as setting forth the correct *Feres* analysis, and *Brown* expressly relied on *Johnson* as stating the relevant factors to be considered under *Feres*. See *Brown*, 739 F.2d at 365, 367-368.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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